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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-288

GLENN R. HEYMAN, TRUSTEE OF THE ESTATE OF F. W. KOENECKE & SONS, INC., BANKRUPT,

Petitioner,

vs.

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Claimant, Respondent.

REPLY BRIEF IN SUPPORT OF CERTIORARI.

LOUIS W. LEVIT
105 West Adams Street
Chicago, Illinois 60603
(312) 782-5330

GLENN R. HEYMAN
One North La Salle Street
Chicago, Illinois 60602
(312) 641-6777
Attorneys for Trustee-Petitioner

HARRY S. MILLER
VARDA A. GOLDMAN
Of Counsel

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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I.

THE ALLEGED "FRAUD AND CORRUPTION" ATTRIBUTED TO THE BANKRUPT CORPORATION FURNISHES NO EXCUSE FOR THE DISCRIMINATION PRACTICED AGAINST THIS ESTATE.

In its brief the State of Illinois insists that the alleged fraudulent conduct of the bankrupt corporation furnished valid grounds for distinguishing the treatment afforded the Koenecke Estate from that afforded to all similarly situated taxpayers. In this connection three points should be noted.

First, the litigant in this case is not the bankrupt corporation but rather a trustee in bankruptcy acting on behalf of bona fide unsecured creditors. Under no conceivable theory can the trustee or creditors be charged with, or held responsible for, any of the alleged improprieties attributed to the bankrupt corporation.

Second, the Court of Appeals itself specifically declared that the State's charges of fraud and corruption were unsupported by the record and formed no basis for its decision.[1] At 533 F. 2d 1025 (A50) the Court of Appeals stated:

> "Finally, the trustee points out that the State's charges of fraud and corruption are not supported in the record, and that the charge of collusion was raised for the first time on appeal. *We agree with the trustees* (sic) *that the State had ample opportunity to develop such evidence, and, having failed to do so, is not now in a position to advance such an argument.*" (Emphasis Added.)

Finally, it must be recalled that the State itself conceded (Fdg. 80-81, A20) that the information regarding the alleged fraud was obtained after the original retroactive assessments were made against Koenecke and all the other distributors, and played no part in the decision to make the assessments. The fact that the State conducted such a vigorous after-the-fact investigation of Koenecke while making no attempt whatsoever to investigate the possibility of impropriety on the part of others who followed the identical practices (Fdg. 79, A20), is conclusive evidence of precisely the type of discrimination which the law prohibits.

This whole charge of fraud and corruption is nothing but a red herring designed to obscure the discriminatory treatment given to creditors of this estate. This technique is graphically illustrated by the State's discussion of its leading case, *People ex rel. Scott* v. *Chicago Thoroughbred Enterprises*, 56 Ill. 2d 210, 306 N. E. 2d 7 (1973). At page 10 of its brief the State declares:

> "The *Chicago Thoroughbred Enterprises* case had its inception in the same Kerner-Isaacs administration which *spawned the Koenecke fraud.*" (Emphasis partially supplied.)

1. The Court will note that the indented paragraphs at p. 13 of the State's brief are merely the State's own argument and not quotations from any court decision or other recognized authority.

The State then cites *United States* v. *Kerner and Isaacs*, 351 F. Supp. 1323, 364 F. Supp. 895; 493 F. 2d 1124, 417 U. S. 976, 418 U. S. 955, a criminal case which has no relationship whatsoever to either the facts or the legal issues of the present case.

Finally, after this blatant attempt at guilt by association, the State deliberately distorts the facts of this case by saying (Brief p. 10):

> "As with Koenecke, C. T. E. was the largest horse racing licensee in the State, and *was the only Illinois operator to fall within the maximum rate of the new graduated schedule.* (Emphasis added.)

The whole point of this appeal is that *unlike* C. T. E., Koenecke was by no means the only Illinois operator to fall within the maximum rate. The record is clear and undisputed that almost 30 other distributors fell into the same category and were nevertheless held by the State to be entitled to retain the benefits of the multiple licenses which they procured and employed in precisely the same manner as did Koenecke. (Fdg. 26, A10)

II.

THE STATE HAS FAILED TO REFUTE THE MAIN ARGUMENTS ADVANCED IN SUPPORT OF OUR PETITION.

Perhaps the most significant feature of the State's brief is not what it contains but what it omits. Nowhere does the State even attempt to meet the principal arguments advanced in support of the Petition for Certiorari. The questions of equitable subordination, equal protection of the laws, the rights of creditors in bankruptcy proceedings, and the overriding supremacy of federal law in bankruptcy cases are all completely ignored.

The State's silence on each of these critical issues is a tacit concession that the decision of the Court of Appeals did in fact constitute a departure from established principles of federal

constitutional and bankruptcy law as declared by this Court and other Courts of Appeals. This in itself warrants review on certiorari.

CONCLUSION.

WHEREFORE, the Trustee prays that the Petition for Certiorari be granted.

Respectfully submitted,

LOUIS W. LEVIT
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Chicago, Illinois 60603
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